DOCUMENT RESUME

ED 064 788 EA 004 460

AUTHOR	Siggers, Kathleen, Ed.
TITLE	With Justice for All. School Desegregation Bulletin Series.
INSTITUTION	California Univ., Riverside. Western Regional School Desegregation Projects.
PUB DATE	Jun 72
NOTE	53p.
EDRS PRICE	MF-$0.65 HC-$3.29
DESCRIPTORS	*Court Cases; *Court Doctrine; Court Role; *Integration Litigation; *Integration Methods; *School Integration; School Law

ABSTRACT

This bulletin contains four articles, each by a different author, that present different aspects of the legal questions surrounding school desegregation. The articles begin with a background summary of the important decisions that have led to the present position of the courts, by Roy E. Chapman. Next, J. Harold Flannery discusses implications drawn from these court decisions that can be interpreted to predict future directions that the courts may take. The next article, by Meyer Weinberg, summarizes significant court actions initiated across the country since the President gave his "moratorium" speech on March 16, 1972. The final article, by Thomas A. Shannon, is an attorney's description of the meaning and application of the new California Education Code recently enacted by legislative statute to reinforce the existing California Administrative Code sections on school desegregation. (Author)

ED 064788

1

ED 064788

U.S. DEPARTMENT OF HEALTH,
EDUCATION & WELFARE
OFFICE OF EDUCATION
THIS DOCUMENT HAS BEEN REPRODUCED EXACTLY AS RECEIVED FROM THE PERSON OR ORGANIZATION ORIGINATING IT. POINTS OF VIEW OR OPINIONS STATED DO NOT NECESSARILY REPRESENT OFFICIAL OFFICE OF EDUCATION POSITION OR POLICY.

WITH JUSTICE FOR ALL

Edited by

Kathleen Siggers

INTERGROUP

Information Dissemination Module
Western Regional School Desegregation Projects
University of California
Riverside, California

EA 004 460

June, 1972

Bulletin Series
School Desegregation
Funded by: Title IV
Section 403

PREFACE

There is serious speculation at the present time about the position the courts will take on matters of school desegregation. Committees and school districts can find evidence to support almost any posture they wish to assume regarding desegregation by reading the newspapers or listening to the dialogue of the political leaders of this country. The real educational, social and legal issues related to school desegregation are obscured by the rhetoric of political expediency and voter indulgence. But the issues exist and will surely surface again for more deliberate consideration. They cannot be ignored.

School districts that have accepted the responsibility for desegregating their schools, or are planning to, and are somewhere along the way between initial commitment and achievement of stated goals, can find solace in the consistency with which the courts on all levels have persisted in their interpretation of the Fourteenth Amendment. The requirement to take affirmative action against "separate but equal" educational systems is reflected even in the most recent court decisions.

This Intergroup bulletin includes four articles, each by a different author, presenting different aspects of the legal questions surrounding school desegregation. The articles begin with a background summary of the important decisions that have lead to the present position of the courts.

Following is a discussion of implications that can be drawn from these decisions which can be interpreted to predict future directions that the courts may take.

Next is a summary of significant court actions that have occurred across the country since the President gave his "moratorium" speech on March 16th of this year.

The last is an attorney's description of the meaning and application of the new California Education Code recently enacted by legislative statute to reinforce the existing California Administrative Code Sections on school desegregation.

The first article was written by Roy E. Chapman, Judge, Municipal Court, San Bernardino, California. It appears as part of the desegregation plan presented to the San Bernardino Board of Education by Superintendent George L. Caldwell, March 16, 1972. The plan is the result of several months of preparation spearheaded by school and community leaders appointed to the task. Judge Chapman recently resigned after twelve years of service as president of the San Bernardino School Board to accept his present judgeship. On June 7 San Bernardino Board of Education began litigation of a law suit initiated by the NAACP charging recision of stated board policy on desegregation.

The second article is by J. Harold Flannery, Deputy Director, Center for Law and Education, Harvard University. The major portion is an edited transcript of an address given at a conference sponsored by the Western Regional School Desegregation Projects at the University of California Conference Center, Lake Arrowhead. The last few pages of the document give a current summary of remedies Dr. Flannery offers to school districts which can be used to overcome the legal problems attendant to desegregation. This portion is reprinted from an article published in the Ohio Department of Education, Office of Equal Educational Opportunity, Mini

Journal, April, 1972. The Arrowhead transcript has recently been reviewed and, where needed, updated, by Dr. Flannery. Interestingly, in spite of the rapidly changing scene in school desegregation, the interpretations and predictions made by Dr. Flannery at the Arrowhead Conference are still timely, accurate and current.

The third article in this series is an editorial by Meyer Weinberg, written for the June Intergroup newsletter recently published. It capsulates the action taken in significant desegregation cases that have appeared across the country since President Nixon spoke in March, 1972, offering a continuation of compensatory education as an alternative to "busing." Mr. Weinberg is editor of Integrated Education: A Report on Race and Schools and has written and published widely in all areas of school desegregation.

The last of the articles is a reprint of a memorandum to "Members of the Board of Education and the Superintendent," San Diego Unified School District, interpreting Sections 5002-5003 of the California Education Code adopted by the California Legislature, March 4, 1972. The "new statute" is compared definitively with Sections 14020-14021, Title 5, California Administrative Code, which it supersedes. The memorandum was written by Schools Attorney, Thomas A. Shannon, at the request of Superintendent Thomas L. Goodman, for the purpose of determining the legal position of the San Diego Unified School District under the new legislation. San Diego School District has appealed its court order to desegregate. Disposition of the appeal is discussed in Mr. Shannon's memorandum.

The purpose of this series is to present a very current look at

the many dimensions of legal requirements facing school districts . . .

"to put it all together," so to speak, in the here and now, June, 1972.

--Kathleen Siggers
Editor

CONTENTS

Preface ii - v

Historical Summary of School Desegregation Law
by Judge Roy E. Chapman 1 - 7

The Role of the Courts in Educational Change
by Dr. J. Harold Flannery 8 - 29

The Courts Are Doing Their Duty
by Meyer Weinberg 30 - 34

California Statutory Provisions Governing Pupil Racial and Ethnic Balance in California Public Schools
by Thomas A. Shannon 35 - 46

HISTORICAL SUMMARY OF SCHOOL DESEGREGATION LAW

by

Judge Roy E. Chapman[1]

In the United States our law generally develops through a process of building on the history of law or precedents. In the area of desegregation law, there is still room for partial conjecture since there are many pertinent questions which have not been dealt with by the highest level federal or state courts. However, the historical trend of court decisions is clearly evident, can be traced, and must be accepted as the guide in the development of desegregation and integration plans.

In the Brown cases of 1954 and 1955 Chief Justice Earl Warren, speaking for a unanimous court, held that "separate educational facilities are inherently unequal," and violate the 14th Amendment. In Brown, (1955), a "good faith" start with compliance being accomplished with "all deliberate speed" was required. During the ensuing years the thrust of the action was primarily focused on the southern school districts and, in fact, segregation in northern and western school districts worsened. For eight years, until 1962, the Supreme Court refused to review any case in this area while several of the lower federal courts took positions which indicated that there was not an obligation to racially mix the affected district schools.

In 1962, however, in Bailey v. Patterson the Supreme Court ruled

---

[1]Judge Chapman, sixteen years a member of the San Bernardino Board of Education, was president of the school board for twelve years. He resigned in 1968 to assume the position of Judge, Municipal Court, County of San Bernardino.

that state laws which imposed segregation were unlawful. Shortly thereafter in 1964 in Griffin v. Prince Edward County Board of Education the court stated that the time for "more deliberate speed" had run out and in 1965 in Bradley v. the School Board of Richmond it announced that "delays in desegregating school systems are no longer tolerable." During this time period it was generally accepted that there were no legal requirements imposed on northern or western schools' desegregation because the desegregation there was a result of social forces rather than specific state laws. In the 1964 Civil Rights Act Congress additionally supported this view by indicating that the racial balancing of schools was not required.

Rather clear-cut lines have been drawn on the distinction between the de facto and de jure segregation questions. Many of the contemporary cases still deal specifically with the de jure or dual system question. However, there are many cases which now appear to deal with the de facto question, one still pending at the Supreme Court level being the Keyes v. S.D. #1 Denver.

In the dual system category the most significant recent case was Swann v. Charlotte-Mecklenberg Board of Education in 1971. In this case the following basic points among others were upheld: (1) limited use of mathematical ratios; (2) putting a heavy burden on school boards to justify one-race schools; (3) approved plan for "pairing" and non-contiguous attendance zones; (4) approved busing to achieve a unitary system in that setting, but acknowledged certain limiting factors--particularly, the age of the students.

Much of the speculation and legal doctrine cited in dual system cases may not be applicable in San Bernardino because this district is

a unitary district and looked upon by most as one in which racial imbalance results from racial concentration in school attendance neighborhoods and not from any act of discrimination on the part of this or previous Boards of Education. Our compliance with federal or state guidelines or the constitution has not been specifically tested. In a similar fact situation considered by the court in Deal v. Cincinnati Board of Education it held that the City Board of Education did not have the constitutional duty to establish a program to racially balance if the imbalance resulted from neighborhood concentration and there was no discriminatory act on the part of the Board and further that the Board had no duty to remedy segregated housing patterns imposed from other public or private sources. In Biggs v. Elliott by dictum the court stated that, "the constitution, in other words, does not require integration. It merely forbids discrimination."

There are cases which trend in the direction of the illegality of racial imbalance of any school system, dual or unitary, and regardless of its cause.

In Singleton v. Jackson Municipal Separate School District the Fifth Circuit Court in 1966 said in a footnote:

> "In retrospect the second Brown opinion clearly imposes on public authorities the duty to provide an integrated system. Judge Parker's well-known dictum in Biggs v. Elliott should be laid to rest. It is inconsistent with Brown and later development of decisional and statutory law in the area of civil rights."

A classic California case, one which was cited frequently, as the 1967 desegregation plan for the district was being developed, is Jackson v. Pasadena City Schools (1963) wherein the California Supreme Court by dictum held that, "The right to an equal opportunity for education and

the harmful consequences of segregation require that school boards take steps, insofar as reasonably feasible, to alleviate racial imbalance in schools regardless of its causes." This statement has been reinforced by the later California Supreme Court case of Johnson v. San Francisco Unified School District where Chief Justice Tobriner, speaking for the court held, ". . .school boards administering de facto segregated systems may bear an equivalent constitutional duty (to desegregate)," and continuing later in the same opinion, ". . .the state cannot constitutionally countenance obstructionism for once the state undertakes to preserve de facto segregation, or to hamper its removal, such state involvement transforms the setting into one of de jure segregation."

In 1965, Chief Judge Sweeney of the United States District Appeal Court (Massachusetts) in Barksdale v. Springfield School Commission held that a state may be required to relieve racial imbalance in the public schools even in a de facto situation: "The defendants argue, nevertheless, that there is no constitutional mandate to remedy imbalance. . . but that is not the question. The question is whether there is a constitutional duty to provide equal educational opportunities for all children within the system...it is neither just nor sensible to proscribe segregation having its basis in affirmative state action while at the same time failing to provide a remedy for segregation which grows out of housing, or other economic or social factors. Education is tax supported and compulsory, and public school education, therefore, must deal with inadequacies within the educational system as they arise, and it matters not that inadequacies are not of their making. This is not to imply that the neighborhood school policy per se is unconstitutional, but that

it must be abandoned or modified when it results in segregation in fact."

In the previously cited Keyes v. S.D.#1 Denver Supreme Court Justice Branen ordered reinstatement of the District Court's findings that a newly-elected school board which acted to rescind a prior plan of desegregation was acting to further segregation. In this case the Judge shifted emphasis from action or inaction on the part of the Board to the actual disparities in educational opportunities for children in minority dominated schools. Implementation of the partial plan previously approved and of a complete plan later approved by the District Court is currently pending before the United States Supreme Court and a decision is expected in June of 1972.[2] In the area of legislation this Board and all others in California have a compliance responsibility to Education Code sections 5002-5003.

> Education Code 5002 states: "It is the declared policy of the Legislature that persons or agencies responsible for the establishment of school attendance centers or the assignment of pupils thereto shall prevent and eliminate racial and ethnic imbalance in pupil enrollment. The prevention and elimination of such imbalance shall be given high priority in all decisions relating to school sites, school attendance areas, and school attendance practices."
>
> Education Code 5003 prescribes the requirements and includes the submission of reports of study, resulting plans of action, and schedules for implementation to the State Department of Education. There is no punitive action attached to this legislation.

From this general base of legal data and further research the following conclusions can be drawn:

(1) The courts have held that racial discrimination in recruitment, hiring, assignment and reassignment, promotion, demotion, and dismissal of staff is unconstitutional.

---

[2]Since the writing of this summary the Court has determined to put this decision over into its next session commencing in October, 1972.

(2) Gerrymandering of school attendance boundaries to effect racial segregation is illegal.

(3) Parent-pupil school selection arrangements are illegal practices.

(4) The construction of new schools upon sites that are more segregated than others available is illegal.

(5) It is illegal to rescind voluntary desegregation plans and it is illegal for states to interfere with voluntary plans by legislation.

(6) The State and Boards of Education have the responsibility of pupil assignment.

In summary, the current trend of cases seems to indicate there is a court requirement to desegregate and integrate the public schools of northern and western, as well as southern states. The present consideration by the Supreme Court in the Denver case will provide a finding which will hopefully clarify the legal responsibility of this Board and will establish standards. The unknown direction of federal legislation and executive action leaves the Board in a position which defies analysis other than frustration in the availability of means or resources to accomplish a stated commitment to integration.

It would appear that this Board must at the very minimum comply legally with the requirements of Education Code 5002-5003, and attempt to present a plan, with schedules, which will result in a significant racial balance in the schools of this district. The procedures and requirements will not be clearly known until the State Department of Education develops and adopts the guidelines for local Boards.

Based on a careful and comprehensive legal analysis the San Bernardino County Counsel has stated that trends emphasized by recent court cases, "...have shown a shift in emphasis away from issuing decrees commanding districts to integrate, to an in-depth look at the

factual situation which must be overcome to achieve equal educational opportunities for students throughout a school district. This has been evidenced in the South by the Swann group of cases and in the rest of the country by Keyes, Banks, Nyquist, Bradley v. Milliken, Brice v. Landis, Johnson v. San Francisco, and People v. San Diego Unified. Courts have looked with more scrutiny at the conduct of school boards to learn if there has been any state action in trying to maintain racially separate schools, U.S. v. I.S.D. #1 Tulsa, Cisneros, Cook Co., and have hinted that other state action may be enough to require the elimination of schools that are segregated, Johnson v. San Francisco and People v. San Diego Unified.

"In the forthcoming months, I would expect courts to continue to expand the definition of de jure segregation while at the same time reaffirming the stand that there is no need to remedy de facto segregation where it exists entirely independent of any state action."

These findings would indicate that Boards of Education can no longer rely on the historical definitions of de jure v. de facto segregation.

The judicial and legislative and executive branches of government have left Boards of Education in a position of requiring compliance without any specific directions as to what level of compliance is required. It appears that each case will be decided on the specific facts applying to the local situation which may include historical facts dating back many decades, inaction as well as action, and the court's determination of what may be necessary to achieve equal educational opportunities for students throughout a school district.

ROY E. CHAPMAN
Judge, Municipal Court
March 16, 1972

THE ROLE OF THE COURTS IN EDUCATIONAL CHANGE

by

J. Harold Flannery[1]

I have been asked to discuss the role of law in educational change or more precisely, "equality of educational opportunity." I agree very strongly with many who say that desegregation is only one component of equality of educational opportunity; that to a large extent, desegregation omits such components as resource allocation, student rights, (apart from minority rights), federal programs, alternative schools, and so on. Desegregation is a large enough component itself so I will focus on desegregation from the lawyer's standpoint.

Mr. Justice Holmes mentioned in another context that a page of history is worth a volume of logic and there is much to that in the whole issue of the law and school desegregation. I would like to set the framework by recapitulating for you, very briefly, how the law of desegregation has evolved up to the present time. Brown vs. Board of Education in 1954 said that state-imposed, dual, racially-segregated systems violated the Fourteenth Amendment of the United States Constitution. We are parenthetically coming to grips with whether that was a racial decision or an educational decision. The consequences of where desegregation goes, in the affirmative sense, depends on how you perceive it. In the early 1960's after the Brown decision, some lawyers, and I think they would agree in retrospect that they were ill advised, brought a series of suits

---

[1]Deputy Director, Center for Law and Education, Harvard University.

in the North alleging that independent of state-imposed, racially-dual systems, there was affirmative, educational right to racially desegregated education. The United States courts rejected that view and the Supreme Court refused to overturn the lower courts' decisions in these cases. Therefore, the law thought it was in the position, the very unhappy position educationally, of saying there is one rule for the South and a different rule for the North. That is, in the South where there are state-imposed, dual systems which violate the Fourteenth Amendment, there is a mandatory obligation to desegregate. But in the North, where segregation is seen to be fortuitous, or as it came to be called, "de facto," there is no mandatory obligation to desegregate; that a voluntary effort on the part of the local, political establishment will suffice.

I should mention, parenthetically, that for educational reasons, both in the broad and narrow sense, I believe desegregation as a surrogate for educational change is worthy of my personal support. Desegregation has exposed problems that exist in systems which have been papered over because the systems or the schools in the systems have been permitted to be ethnically homogeneous.

Legally speaking, we seemed to have been on dead-center in the mid-1960's, the North without an obligation to desegregate and the South with an unclearly defined, but nevertheless, a mandatory, legally enforceable obligation to desegregate.

Lawyers and courts have been revisiting the question of what is illegal separation. Is it a legal fiction to say the separation which exists in the North is not only educationally deleterious, but also

fortuitous? If you look at pupil separation in the North you will find that it exists by public design. It is the product of the policies and practices of school boards and other public and private institutions, and empirical social forces that have brought about the existing pupil separation.

I would like to discuss with you what the courts are looking at to reach the somewhat novel conclusion that pupil separation in the North is no less illegal than in the South. What indicia or criteria are they using? You may find some of these may be applicable to your system, although perhaps none of them will apply directly.

Discriminatory Distribution of Staff

The first, and fairly obvious, indicium of illegal separation in the North is faculty and staffing patterns. How are faculties, staffs and administrators allocated? Is there a statistically improbable distribution of school staff? In a statistically probable distribution you would expect to find that no school in a particular school district is racially disproportionate from the standpoint of faculty and staff. Each school looks more or less like the faculty and staff of the entire district. However, if you look at the school district and you find that Chicano teachers or black teachers are concentrated in schools in which black, Chicano, or other minority children are concentrated, someone has made a judgment, and implemented a judgment, that the race of the faculty is going to mirror the race of the student body.

Conventional wisdom was that children may get placed in schools because of racial concentrations which may occur fortuitously. But somehow it is implausible to suggest that faculties get there other

than by the assignment of central administrators. So in Northern cases the courts have held that a racial or ethnic concentration of faculty and staff is an independent violation of the Fourteenth Amendment. The remedy approved by the Supreme Court in the Montgomery, Alabama case is that each faculty and staff of each school in the system should look more or less like a microcosm of the overall system.

There is more to the faculty and staff thing than just this however, because the courts have said, "All right, administrators very clearly make faculty and staff assignments and we caught them discriminating in that. Now these same people were making judgments about pupil attendance criteria, so we are going to divest them of the presumption of innocence which normally accompanies defendants in civil cases." School boards usually say, "The burden of proof is on the plaintiff to prove that children are racially isolated or segregated in schools as a result of illegal school board policies and we enjoy a presumption of innocence." In the face of faculty and staff segregation, the courts are tending increasingly to say, "The same people who were assigning teachers discriminatorily were making judgments with respect to pupil-attendance criteria. Perhaps the presumption of clean hands with respect to pupil-attendance criteria should not be enjoyed by a board that has engaged so obviously, so overtly, in a separate but related violation of the Fourteenth Amendment." And this becomes enormously important because, in effect, the burden of proof shifts. It is the school board which has to exculpate itself, to demonstrate to the court that a pupil assignment decision which the school board made which results in racial or ethnic imbalance was made in the best of good faith.

Some have suggested that faculty segregation is permissible where it is based upon educational considerations; for example, assigning Chicano teachers to disproportionately Chicano schools because they, more than Anglo or black teachers, speak Spanish. I believe this is a doctrinal conflict and I am not confident that the law is going to deal with it creatively. I am familiar with the argument that many black and white teachers are unfamiliar with, and insensitive to, the problems of the Chicano students; therefore, Chicano teachers should be disproportionately assigned for educational reasons to barrio schools. The law has not come to grips with that argument and I would think the reason for a concentration of teachers would be less persuasive if there were a dispersal of the children. I would hope that all teachers in a system, irrespective of their own ethnic confinement, would become sensitive to the needs of Chicano or native-American or black children. I have no simple prescription for this dilemma.

Pupil Separation

Now let us consider the individual components of pupil assignment decisions which the courts have regarded as violative of the Fourteenth Amendment. First, the most obvious one is attendance zone lines. Are the attendance zone lines gerrymandered? Are they irrationally drawn with respect to the local topography? That is not difficult to demonstrate in some instances, but there is another aspect of zone line drawing which you should bear in mind. No matter how plausibly the zone lines have been drawn in terms of topography, has it resulted in some schools which are significantly overcrowded and racially identifiable,

and other schools which are significantly not used to capacity and also racially identifiable?

It is not uncommon in Northern districts to have one 900-student capacity school occupied by 1200 to 1300 black children and another 900-student capacity school occupied by significantly fewer than 900 white children. At that point the court says, "What educational, non-racial, rational reason could the school board have had for maintaining the prior zone lines? If this were a racially homogeneous district, would not the board have dealt with the overcrowding and undercapacity problem by changing the attendance zone lines?" And the burden again shifts to the board to persuade the court that their failure to change those lines was for educational, non-racial reasons.

Voluntary Transfers

Another component of illegal pupil segregation practices are so-called "neutral attendance plans" executed by voluntary parent and pupil choice. These include unqualified open enrollment, which in many districts is a euphemism for facilitating white flight from schools that are disproportionately black or Chicano, to schools that remain largely or entirely white. Parents have their choice of enrolling their children in any one of several schools in a district. Somehow, although the attendance zone itself may be hypothetically 60-40, white-black, one school ends up 95% white and the other 95% black. Of course, there are free transfers, in the Southern context, "freedom of choice," which are also impermissible where they result in segregation.

Now, modified or qualified open enrollment systems which permit so-called majority-to-minority transfers and vice versa have been approved

by the courts. Where a pocket of isolation remains which administrative feasibility makes very difficult to desegregate, such a modified, open enrollment plan has been required. The open enrollment plan I was speaking of, which the courts have condemned, is that plan which was unqualified or unmodified; where a pupil may transfer without qualification, irrespective of the composition of the school he is leaving and the composition of the school he is going to.

You may ask if a white child is permitted to move only from a majority-white school to a majority-black school, or a black is permitted to move from a majority-black school to a majority-white school, is this not reverse discrimination? Is this not facilitating racial choice-making? As Chief Justice Berger put it in the Charlotte-Mecklenberg case, in the best of all possible worlds some sort of neutral, hands-off, color-blindness might be entirely salutary. The best of all possible worlds, which I hope we will achieve, is one of equity and parity, not assimilation. Such choice-making can be frowned upon just as exclusive choice-making has been frowned upon in the past. I think the reality is that enforced separatism and short-changing of resources has been the order of the day. The courts say explicitly that the Fourteenth Amendment permits affirmative, compensatory choice-making to help whites and minorities make up what they have lost by separatism.

The Constitution endorses a policy of ethnic inclusivity; it forbids policies of ethnic separatism. Whether it requires it in all circumstances is a different and difficult question.

There are no precisely delineated Federal guidelines that define racial isolation or balance. It is not very difficult when you are

talking about two schools to know which transfers are facilitating separation and which are enhancing desegregation. Massachusetts defines an imbalanced school as one that is 51% black. I would think this definition is probably a product of 1965 draftsmanship rather than an educationally considered choice. The courts tend to say a more salutary rule might be the ethnic composition of the district; that is, holding each school within some norm based ultimately upon the existing ethnic composition of the district. That is what California does and I suppose in California the 15% deviation rule would be the one applied.

Transportation

The third area which the courts have found to be violative of the Constitution involves transportation. I do not mean the Southern, dual system but transportation which occurs in many Northern systems for safety reasons or to relieve overcrowding. Those instances which the courts cited as being violative were, for example, black youngsters being transported to relieve overcrowding. Transported not to the nearest school with capacity, which may be a white school, but to some farther school which looks more like the overcrowded school from which the youngsters were being moved. Similarly, if you are speaking of so-called transportation for safety reasons, if the result is to transport youngsters to a school where the other children are just like them, ethnically speaking, and to pass up intervening options of schools with a different composition, the courts have found this to be a violation of the constitution.

New Building Construction

Site selection and construction are areas of considerable significance. What happened in one border state city is typical of what has been done in many Southern and Northern Systems. The city had a policy of building 16-18 room elementary schools. After Brown vs. Board of Education, they departed from this principle. In one instance, they built two 8-room elementary schools within a mile and one-half of each other. One served a racially-identifiable community which was black and the other served a racially-identifiable community which was white. There was no educational or other reason why a spot between the communities for one 16-18 room school could not have been chosen. So the change to the 8-room schools was determined to be a violation of the Constitution. In matters of site selection and construction, the court asks, "Has the school board chosen the option which will ameliorate ethnic separatism, which is what the Constitution requires, or has it chosen that option to location within the system which will worsen or accentuate ethnic separatism?" If it has done the latter, that, too, is a violation of the constitution.

Some systems have persisted in this in the face of educationally sound recommendations to change. One Northern system I am familiar with persisted in maintaining K-8 elementary schools instead of going to K-5 elementary schools and 6-8 middle schools, which had been proposed by their superintendent. The evidence showed that they resisted the concept of the middle school, not for educational reasons, not for economic reasons, but for the reason that it would bring black and white children together. That racially-based negative resistance to an educa-

tionally supportable principle was found to be a violation of the Fourteenth Amendment.

School Board Recision

There are several doctrines which I cannot represent to you as clearly or fully developed as some of the others. One of these is the so-called recision or retreat principle or the "high-water mark" principle. In Denver, Colorado, the board embarked upon a voluntary desegregation plan and there was a recall election. Four board members found themselves without positions, whereupon the new board rescinded the voluntary desegregation plan. The Federal district judge, taking into account a number of other so-called "de jure" acts, or board policies and factors, held that the recision itself was a violation of the Fourteenth Amendment.

Resegregation

I would like to talk very briefly about intra-school segregation and about the tracking, grouping and classifying of children. In a very simplistic sense, intra-school segregation states, "Okay, we will desegregate but the blacks are going to be in this section, the whites are going to be in this section, and the Chicanos in this section." Of course, this is a very clear violation of the Fourteenth Amendment, no less so than that "the black children are going to go to this school and white children, to this school."

Now I am going to enter the realm of prediction, so take what I say cautiously. It seems to me that increasingly the courts are coming to condemn so-called tracking, grouping and classifying tech-

niques which result in the same people at the bottom of the heap who have always been there.

The people at the Educational Testing Service are among these who acknowledge that tests are culturally biased, that most of the tests presently given have ethnic effects which are irrelevant to education. The U.S. Office of Education commissioned a report from a group of educators led by Dr. Warren Findley of the University of Georgia. Basically, the conclusion of the report was that the tracking, grouping and classifying of children does nothing to enhance the educational experience of so-called "fast achievers," and is perniciously destructive to so-called "low achievers." Many of you educators know the arguments and reasons for this better than I do--the self-concept, the Pygmalion effect and all the other negative aspects of homogeneous ability grouping.

One recommendation of that report was that there should be heterogeneous ability-grouping in Grades K-9, which would necessitate some significant differences in teaching methods and augmentation of teaching personnel. In Grades 10-12 there should be tracking on a self-selection basis and it should be highly permeable. A student entering the tenth grade should have the option to choose a vocational program, for example. But if, upon entering the eleventh grade, that student decides he would be happier in chemistry or French, he should have another opportunity with a more-sensitive-than-uaual counselor to assist him in that choice.

It seem to me that the courts may say, if there are very clear racial, ethnic effects resulting from tracking and grouping, and plainly deleterious effects to the children designated as "low achievers," with-

out a corresponding educational advantage to anyone including the "fast achievers," then what we have is a racial effect without a compensating, educationally rational basis for it. Whatever its status as an educational principle, heterogeneous ability-grouping may become the legal rule and if it does, homogeneous grouping would be another form of intra-school segregation which would be illegal.

De Jure Segregation by Policy and Practice

There are two other doctrines coming into currency which constitute illegal segregation. In the first one, the judge in the Denver case took a look at twelve schools and could find school board policies that accounted for the racial isolation of those schools. They were practicing some of the policies I have described and the judge ordered that the schools be desegregated.

This same judge took a look at another group of schools which were racially isolated, black or Chicano, and he could find only fortuity contributing to that racial isolation. He could not find school board policies, in the conventional sense, contributing to that isolation. Then the judge looked at achievement test scores in those schools and found the children there were one and one-half to two years behind the children in the Anglo schools. Putting aside the validity of the tests used, he stated that this was inequality of educational opportunity. He ordered a hearing on relief, at which James Coleman, Neil Sullivan and other experts testified. These men testified that while the future might prove the efficacy of compensatory education, in their judgment the most reliable, fastest and surest way to equality of educational opportunity would be desegregation. With that testimony in

mind, the judge ordered those schools to desegregate and not because there were de jure violations in the conventional or traditional sense. This ruling has since been reversed and is now pending Supreme Court interpretation and decision. I can only represent to you that this doctrine may be a straw in the wind.

Segregation by Housing Patterns

A common view in the mid-1960's was that housing segregation accounts for much pupil segregation in schools. The school boards did not cause housing segregation and school boards should not bear the burden of curing residential segregation. There the matter rested until 1968 when a court said, "School boards must be more than neutral with respect to pupil assignment, criteria and patterns." Practically any black, Chicano, Asian or native-American citizen could have told the courts that residential segregation in this country is due almost entirely to public and private discrimination. For years between the 1930's and 1960's, public housing projects were designated for racial occupancy, white or black, and people were assigned to those projects on that basis. The practice of building low cost government housing in low economic level, ethnically segregated areas continues today. Schools have been built to accomodate the children who lived in those projects. At best it is naive to say that when the school turns out to look like the project, which was designated for black or white occupancy, that this is a fortuitously or de facto segregated school. Thereafter, public housing authorities assigned tenants on a freedom-of-choice basis. Nevertheless, public housing projects, because of the site selections

and how they were designated, usually are racially identifiable, and this has a very clear impact on the schools.

The practices of the Federal Housing Authority I need not detail: the red-lining; the refusal to insure property in the white area if the purchaser was black; the officially condoned discriminatory private practices. Today in Detroit, Michigan, white realtors advertise one set of properties in the black community newspaper and the same realtors advertise an entirely different set of properties in the Detroit Free Press and the Detroit News. It would be naive to say that the residential patterns which characterize our country, not only the inner city but the suburbs as well, are the result of anything but public and private discrimination. In short, it seems to me that the courts are moving away from this naive acceptance of residential segregation. While perhaps in a narrow sense, the school board was not directly responsible for residential segregation, other social institutions were and the schools supported them. What is the educational or legal desirability of building everyone's prejudices into a school system?

The Supreme Court came up to that issue in Charlotte, North Carolina, and very carefully and explicitly declined to rule on it. Basically the Court said, "What we have here is old-fashioned, state-imposed dualism, so we will not worry about those more complicated analyses. We will just require maximum, effective desegregation for more traditional and conventional reasons."

Equity and Pluralism is Basis for Planning

Another interesting area I would like to discuss briefly because I

find great sensitivity to it is the question involving discriminatory plans. Discriminatory plans are essentially based on what the mainstream culture, the white people, do to and for minority people. The end result is one-way busing, phasing out black and Chicano schools and busing minority children to white schools.

While the law is relatively underdeveloped in this area, it is, I think, fairly clear. In the Pasadena and the Oxford, Mississippi cases among others, the courts have said, "If Brown vs. Board of Education was a racial insult, it is no less racially insulting to treat desegregation as a process whereby black and Chicano children are turned into white children in every respect but the color of their skin." The courts have said that if there is going to be a physical inconvenience resulting from desegregation, in the sense of who moves where and what schools will be phased out, that inconvenience, like the benefits of desegregation, must be spread equitably across the district. That inconvenience must not be visited upon a racially identifiable segment of the community.

If the years before Brown were the years of oppression, and the years of condescension, it seems now that we are moving into the years of synthesis. Black children and Chicano children are not going to be turned into white children and they are not going to have white values foisted upon them. Schools are going to look like very different places. The formerly white school is going to be a synthesis, I would hope, of a number of strengths and mutually respected cultural traits. This is what underlies the courts' condemnation of what I would characterize as discriminatory plans.

In Hobson vs. Hansen in 1967, Judge J. Skelly Wright said that it

may be somewhat short-sighted to talk about equality of educational opportunity [in view of current practices of the drawing of school district boundaries]. Is there any rational or educational reason to draw school district lines co-terminus with other political boundaries? Why should we not talk about a system that is composed, not only of Washington, D.C., but of Alexandria, Arlington, Bethesda, and Prince George County? The world is not a 90% black world and it seems unrealistic to talk about equality of educational opportunity in a district which is so strikingly disproportionate, ethnically, to the larger community.

This is a major contention in a number of cases pending. Richmond, Virginia, is probably the farthest along and is receiving most careful treatment from the doctrinal standpoint. In Richmond, suit was brought against the State Department of Education and the virtually all-white counties of Chesterfield and Henrico to compel consolidation with Richmond's majority black system from the standpoint of economics, ethnicity and other educational factors. It would seem to me that the changing of district lines themselves is a likely "tomorrow" in the development of school desegregation law.[2]

There are precedents for the changing of district lines in at least two Southern cases. In Arkansas, the court took a look at two school districts which were created around the time of Brown vs. Board of Education. Changes in the prior district were made so there would be a largely black district and a largely white district and the court said that was a violation of the Fourteenth Amendment. You cannot gerrymander

---

[2]This case has been decided, overturned by appeal, and again appealed to the Supreme Court.

school districts that way any more than you can schools.

One last factor is in the area of socio-economic influence. This has had little legal attention but it certainly comes up in the Higher Education Bill. And it is a theme that runs through the Coleman Report. Coleman regards it as a more important variable than race. It has been almost subliminally articulated in a number of decisions. I think our best hope would be that when a school district is in the planning stages of desegregation it would take the socio-economic factors into account along with all other things. They are extremely important to the success of any desegregation plan.

Legal Requirements of Segregation Remediation[3]

We turn now to the questions of remedy: what must school authorities do to cure illegal segregation and its effects? The first and currently most important question is, how much desegregation does the law require. According to the Supreme Court in the Charlotte and Mobile cases, in the South, where unconstitutional laws required complete separation, the standard of adequacy is maximum actual desegregation. The Court did not require "racial balancing" in so many words, but there appears to be general agreement among lawyers and educators that full compliance with the court's standard will result in each school in affected systems be-

---

[3]The last pages of this publication are reprinted from an article written by Dr. Flannery and recently published in Ohio Department of Education, Office of Equal Educational Opportunity, Mini Journal, Volume Four, Number Two, April, 1972. The remedies suggested here by Dr. Flannery, seem to appropriately summarize his position taken earlier at the "Lake Arrowhead Conference" at the University of California Conference Center.

Another recent article "School Desegregation Law: Recent Developments" by Dr. Flannery appears in the May-June, 1972 issue of Integrated Education: A Report on Race and Schools, edited by Meyer Weinberg.

ing an approximation of the racial ratio in the district as a whole. And school authorities will bear a heavy burden of justifying (upon nonracial grounds of impracticability) statistically significant departures from that standard.

Is that the standard of adequacy in the North, however, where the illegal practices have rarely, if ever, completely segregated children into parallel dual systems? There are two schools of thought on this question---albeit with the usual assortment of eclectics, and the Supreme Court has not yet decided this issue, although it may do so during this term.

One line of reasoning is exemplified by President Nixon's school desegregation statement in March of 1970. It is that school authorities are obliged only to cease illegal practices and cure their measurable effects. By this standard all school segregation resulting from factors other than school board policies and practices would be characterized as fortuitous and left untouched. The basis for this position is usually said to be that the traditional remedial powers of federal equity courts are limited to prohibiting, and curing the effects of, provable illegal conduct. And that, while complete desegregation may be educationally desirable, courts are not empowered to formulate and implement social policy.

The position in support of a remedial standard of maximum feasible desegregation may be summarized as follows. First, as a practical matter it is virtually impossible to quantify precisely the separatist effects of illegal school board practices, and there is no reason in law or policy to place the burden of doing so upon proponents of de-

segregation. Thus, where a school board has affected the residential composition of a mixed neighborhood by creating a racially identifiable school (by, for example, selecting a segregated site and assigning a disproportionately minority faculty), the plaintiff should not be required to prove to a certainty that, but for the board's conduct, the school would today be desegregated. Second, courts should not favor remedial plans that may cause resegregation and intra-district instability. These are common effects of plans that desegregate some schools while leaving others disproportionately white (or black) toward which parents who wish to avoid desegregation may "flee." Third, balancing is more likely to insure an equitable distribution of intra-district educational resources, and it promotes socio-economic heterogeneity, which along with racial desegregation has been identified as an important factor in equality of opportunity. Fourth, if desegregation is educationally advantageous, it would seem prudent to maximize it, although something less might also satisfy the law. And lastly, minimal desegregation plans tend to prolong a district's litigation burden by inviting appeals and motions for supplemental relief.

In sum, although many educators and lawyers find the reasons for maximizing desegregation to be compelling, as have a majority of the the courts in Northern cases, it would be premature to characterize that, until the Supreme Court has spoken, as the standard always and everywhere.

The second aspect of the question of remedy is what devices or techniques must or may school districts use to accomplish desegregation. The courts require that districts must use any educationally sound and administratively feasible device that is necessary to accom-

plish the objective. That is, racially "neutral" pupil assignment plans in place of formerly discriminatory ones are not sufficient, unless they achieve desegregation. Similarly, the test is not whether plans are adopted in "good faith;" they are sufficient only if they do the job.

No one plan or set of mechanisms is appropriate for every district, so it would not be fruitful to discuss each device in detail here. Briefly, the ones required by courts have included:

(a) Integration-oriented redrawing of attendance zone lines and, in several cases, school district boundaries;

(b) Contiguous and non-contiguous school pairings and groupings, with or without grade restructuring;

(c) Revised site selections and construction policies, including educational parks and new uses of portables;

(d) Optional devices, including majority to minority transfers, magnet schools, differentiated programs, and metropolitan cooperation;

(e) Pupil transportation;

(f) Faculty and staff desegregation including recruitment and hiring as well as promotions, dismissals, and reassignments; and

(g) Non-discriminatory reallocation of intra-district resources.

It should be emphasized with respect to (d) (optional devices) that they are legally adequate as desegregation mechanisms only to the extent that they are actually effective.

It must also be emphasized that the courts will not permit the adoption---voluntarily or otherwise---of desegregation plans that are themselves racially discriminatory. For example, plans that are based upon one-way busing of minority children, or the closing of educationally

adequate minority-schools, have been forbidden. Essentially, two principles underlie this doctrine. First, plans which unnecessarily inconvenience minority children and parents, in order that majority convenience may be served, are as discriminatory as segregation itself, and hence illegal. Secondary, such plans are unsound from the standpoint of policy in that they risk forfeiting the support of the minority community.

The last remedial question is, whose legal responsiblity is it to accomplish the required results. School desegregation cases have focused traditionally upon local school districts, and they will not be relieved of that obligation in the cases to come. However, building to some extent upon several Southern cases, the courts are, in effect, rediscovering that providing equality of educational opportunity to all children is ultimately the non-delegable constitutional responsibility of the states. To be sure, most states have conferred appropriate authority upon local districts for reasons of convenience. But the legal responsibility for fulfilling constitutional guarantees is that of the states, whether they do it themselves or through their instrumentalities. Thus, in the recent words of Judge Merhige in the Richmond, Virginia, case:

> Federal courts in school desegregation matters may legitimately address their remedial orders to defendants with state-wide powers over school operations in order to eliminate the existence of segregation in schools chiefly administered locally by subordinate agencies.

To summarize, the courts have held to be illegal a wide variety of Northern assignment devices that have resulted in pupil and teacher segregation. And no less than in the South, the courts are requiring school districts and, where appropriate, state authorities, to adopt

and implement desegregation plans that---in the words of the Supreme Court, "promise (s) realistically to work, and promise (s) realistically to work now."

The development, status, and prospects of some political rhetoric may be otherwise, but judges and educators, let us all hope, are guided by the law.

THE COURTS ARE DOING THEIR DUTY

by

Meyer Weinberg[1]

Quietly but consistently, American courts are paying little heed, thus far, to President Nixon's March 16th address on desegregation policy. That pronouncement criticized judicial orders directing extensive busing and stressed compensatory education over desegregation. It called for a moratorium on further busing orders.

Important desegregation decisions have been handed down since March 16th by the supreme courts of Washington and Pennsylvania, by a California superior court, by federal district courts in Detroit and Memphis, and by the U.S. Court of Appeals for the Fifth Circuit.

Let us review these cases.

1. Detroit, Michigan. Despite a request for postponement by the U.S. Department of Justice, Federal Judge Stephen J. Roth proceeded to rule on March 28th that "relief of segregation in the public schools of the city of Detroit cannot be accomplished within the corporate geographical limits of the city." The way was thus opened for a later judicial order directing a metropolitan solution. /Bradley v. Milliken/

2. Richmond County, Georgia. A panel of the U.S. Fifth Circuit, headed by Chief Judge Brown, rejected two contentions that are prominent in current public discussion. To the argument that a lower court deseg-

---

[1]Editor, Integrated Education: A Report on Race and Schools.

regation order harmed "quality education," the panel directed that "the district court should not...permit the use of such platitudes to perpetuate a dual-school system, nor could it permit defendants to rely on the inferiority of certain school facilities to which children were to be transferred as a justification for continued racial discrimination." The appeals court also held that "there is no indication whatsoever that the transportation required as a result of the /lower/ court's plan would adversely affect the health of the children or impinge on the educational process." /Acree et al. v. Drummond/

3. Richmond, California. In a state superior court decision on April 3rd, Judge Raymond J. Sherwin declared a voluntary desegregation plan to have failed and ordered the school board to accomplish racial balance in the Verde School. He held that the imbalance was de jure. Also, Judge Sherwin took note of the failure of compensatory education to raise achievement levels at Verde School. Judge Sherwin observed that "the Court was invited /by defendants/ to consider the polemics of public figures, such as the President, as well as to have a care for opinion and public feeling." He commented: "It will be a sad day when the system of justice in this country is perverted by fear of public opinion. As counsel well know, there is never a jury trial in the State of California which is not accompanied by an instruction to the jury that public opinion and public feeling must play no part in the verdict. It is disappointing to hear experienced counsel suggest that the standards for courts might be less." /Johnson v. Richmond/

4. Seattle, Washington. A lower court had enjoined the Seattle Board of Education from implementing a desegregation plan it had adopted

voluntarily. On April 6th, the Supreme Court of the State of Washington dissolved the injunction and reinstated the plan. Plaintiffs had asserted a right to send their children to the neighborhood school. The court observed: "No authority is cited which supports this proposition." Rejecting the argument, the unanimous court ruled: "It was the judgment of the board that where residential patterns have created a segregated city, integration of schools cannot be achieved without some modification of the neighborhood school formula. Faced with this dilemma, the defendant school directors concluded that their duty of providing for all children an equal opportunity for a sound education could most effectively be performed by adopting such a modification of the existing system.... Their decision reflects an exercise of honest and conscientious judgment. We know of no principle of law upon which a court would be justified in setting it aside." /Citizens Against Mandatory Busing et al. v. Palmason/

5. Harrisburg, Pennsylvania. Plaintiffs charged that the city school board had adopted a desegregation plan only under "duress" of an order by the Pennsylvania State Human Relations Commission and that the plan denied the constitutional right to a neighborhood school. On April 20th, a unanimous state supreme court rejected these arguments and upheld the desegregation plan. The court called arguments about duress "hollow." As for the charge of unconstitutionality, the court held: "The essence of the charge is that when a school board undertakes to correct racial imbalance resulting from de facto segregation by a program which involves pupil assignment and transportation and thereby eliminates or radically changes the pre-existing pattern of neighborhood schools, it has violated the Equal Protection Clause. We emphatically disagree."

While acknowledging that the plan imposed a burdensome busing obligation, "it is patently clear that the burden, along with the concomitant benefits of an improved educational environment and more and better services and facilities, is evenly distributed among all students." The court also faced up to the legitimacy of busing to cure de facto segregation, holding: "If assignment and busing of pupils may be acceptable, and indeed required, methods of attempting to overcome racial segregation where that condition is historically of de jure origin, it would indeed be anomalous if they were nevertheless considered to be unreasonable, discriminatory and therefore unconstitutional methods when voluntarily employed by a state to rectify an imbalance which is the product of de facto segregation." The Pennsylvania high court also quoted the U.S. Supreme Court Swann ruling which specifically approved the constitutionality of local school authorities concluding "that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole." /Balsbaugh v. Rowland/

6. Memphis, Tennessee. U.S. District Judge Robert M. McRae, Jr. rejected the school board's request for postponement of an order to bus 13,000 pupils in September, 1972. /Northcross v. Board of Education, Memphis City Schools/

7. Moultrie, Georgia. On May 10th, a panel of the Fifth Circuit of the U.S. Court of Appeals, headed by Judge Bryan Simpson, directed the board of education to double the number of schools in a desegregation plan. The entire county was made the unit of desegregation. Significantly, the court also specified that all-white schools qualify as "seg-

regated" under the Swann ruling. /Harrington v. Colquitt County Board of Education/

Several specific features of the rulings may be listed:

1. They touch all geographical areas of the country.

2. They reach all levels of state and federal courts, except for the U.S. Supreme Court.

3. They have resisted, directly or indirectly, efforts by the executive branch of government to blunt their rulings.

4. They refuse to accord the neighborhood school any status as a legal principle.

5. They accept busing as a means of undoing de jure segregation and, in the Harrisburg and Richmond, California cases, de facto segregation, as well.

6. They depend heavily on the leadership of the April, 1971 Swann ruling by the U.S. Supreme Court.

7. They affirm the right of school boards to adopt voluntarily far-reaching desegregation plans.

These rulings send a clear message to the country: Meaningful desegregation will continue under judicial guidance. Neither the vigor nor the scope of court actions has suffered in recent days. Rather, both have been maintained and even expanded.

Citizens may well take heart in the degree to which our courts are holding fast to their constitutional obligations.

CALIFORNIA STATUTORY PROVISIONS GOVERNING PUPIL RACIAL AND ETHNIC IMBALANCE IN CALIFORNIA PUBLIC SCHOOLS

by

Thomas A. Shannon*

On March 4, 1972, Sections 5002-5003 of the California Education Code became operative. These sections, added to the law by the 1971 Regular Session of the California Legislature, form the statutory basis for pupil racial and ethnic balance in the public schools of the State.

Education Code Sections 5002-5003 were based largely on pre-existing rules and regulations of the California State Board of Education contained in Sections 14020-14021, TITLE 5, California Administrative Code.[1] The close parallel in the language of the new statutes and the State Board of Education rules and regulations adopted earlier is shown in EXHIBIT A of this memorandum.

The practical question which arises is:

> In view of the similarity of new Education Code Sections 5002-5003 and TITLE 5 Sections 14020-14021, what is the significance at law of the new Education Code Sections?

When asked a similar question by the California legislator who

---

*Schools Attorney, San Diego Unified School and Community College District. This memorandum from the Office of the Schools Attorney was written by Mr. Shannon and presented to Superintendent Thomas L. Goodman and members of the Board of Education, April 12, 1972. It responds to a request by the Board for an interpretation of California Education Code Sections 5002-5003 which became effective legislation on March 4, 1972. This memorandum carefully examines the differences between the "new Education Code" and the previous provisions under Sections 14020-14021, Title 5 of the California Administrative Code adopted in 1968. In "Exhibit A" Mr. Shannon gives a definitive comparison of the two directives governing ethnic balance in California Schools.

authored Education Code Sections 5002-5003, the California Legislative Counsel concluded that:

> . . . the provisions of Sections 5002-5003 of the Education Code . . . do not materially expand the duty of the governing board of a school district under existing law, including State Board of Education regulations, to take affirmative steps, insofar as reasonably possible, to eliminate racial imbalances in the schools under its jurisdiction.[2]

This conclusion was based on the analysis of the California Legislative Counsel that the provisions of Education Code Sections 5002-5003 "are nearly the same" as the provisions of TITLE 5 Sections 14020-14021. But, it should be noted that the California Legislative Counsel is also of the opinion that public school district governing boards in California, prior to March 4, 1972, the effective date of Education Code Sections 5002-5003, were, and are now, required by law

> . . . to take affirmative steps, insofar as reasonably possible, to alleviate racial segregation in the schools under its jurisdiction, regardless of its cause.[3]

Apparently, the California Legislative Counsel viewed the enactment of Education Code Sections 5002-5003 as being largely duplicative of TITLE 5 Sections 14020-14021 and, therefore, the piling of two similar laws one upon the other, since both have the full force and effect of law and both concern the same subject. While this conclusion of the California Legislative Counsel appears sound when viewed from within the limited scope of the questions posed to him, there are broader dimensions to the issue which now must be considered.

In our opinion, the addition by the California Legislature of Education Code Sections 5002-5003 was <u>not</u> an idle act simply bringing forth more of the same. Its general significance may be outlined in six points, as follows:

1. New Legislative Policy on Pupil Racial and Ethnic Balance in Public Schools of California is Declared. Education Code Sections 5002-5003 represent the first effort by the California Legislature to enunciate a specific policy on pupil racial and ethnic imbalance in the public schools of California. In doing so, the Legislature has removed any doubt about the direction in which the State government intends to move public education. Moreover, the Legislature has lifted pupil racial and ethnic balance issues from the morass of philosophical debate which saw advocates link pupil racial and ethnic balance with "equal" education, on the one hand, or with "compensatory education," on the other hand, each to the exclusion of the other. In short, the issue at the Legislative level no more is couched in terms of "equal" or "compensatory" education; now, the concept of racially and ethnically balanced education is articulated with directness and candor. This presages a profound change in the posture of the Legislature for years to come.

2. State Board of Education Directed to Implement New Legislative Policy Declared in Education Code Sections 5002-5003. Under the new statute, the State Board of Education is expressly charged with the responsibility of adopting rules and regulations to implement the Legislative policy on pupil racial and ethnic balance in the public schools of California. Essentially, the State Board of Education has lost some of the initiative. That is, under TITLE 5 Sections 14020-14021, adopted by the State Board, it could set its own pace of enforcement because the policy being enforced was its own. This discretionary authority is now gone. Today, the State Board must use its rule and regulation making power consistent with, and in support of, the new statutes. If it does not, legislative sanctions (in the form of the enactment of more explicit

implementing statutes) or judicial sanctions (in the form of the State Board will adopt the required implementing rules and regulations, but this task should be done within a "reasonable" time or an action in Mandamus could lie against the State Board.

Finally, it should be observed that the State Board has not lost all of the initiative because, at least for the immediate future, the implementation of Education Code Sections 5002-5003 is going to depend entirely upon the adoption of the rules and regulations adopted by the State Board and their enforcement by the State Department of Education. Paramount among these rules and regulations will be those which actually require local public school districts to take certain steps to remedy pupil racial imbalance, in addition to making studies and filing reports and plans. Another real task lies in giving substance to the general language of Education Code Sections 5002-5003. As a practical matter, this involves devising suitable definitions for such terms as "high priority," "consideration," "differs signifcantly from the districtwide percentage," "effect of such alternative plans on the educational programs," "total educational impact" and the "adequacy of alternative district plans," to mention only a few terms which are used in Education Code Sections 5002-5003 and which are subject to as many varying shades of interpretation as there are colors in a rainbow. In addition to the definitional problem, time deadlines and techniques of inducing compliance must also be an integral part of any really enforceable State Board rules and regulations.

3. <u>New Legislative Policy Contemplates "Acceptance" or "Rejection" of Pupil Racial and Ethnic Balance Plans Submitted by School Districts</u>. A portion of the new Education Code Sections which does <u>not</u> reiterate a

TITLE 5 provision requires that school districts submit to the State Department of Education "plans of action" to carry out the Legislature's policy on pupil racial and ethnic balance in the public schools of California. The Department must either accept or reject the plans. While the new sections are silent on any sanctions or follow-up procedures which may be imposed upon districts whose plans are rejected, this aspect presumably may be covered in the implementing rules and regulations to be adopted by the State Board of Education. The concept of a central State governmental agency, acting under direct authorization of the State Legislature, accepting or rejecting plans on pupil racial and ethnic balance in local public school districts throughout California is another indicia of the significance of Education Code Sections 5002-5003.

4. Interpretation of the California State Attorney General on the New Legislative Policy. In the lawsuit San Diego Unified School District v. California (United States Supreme Court No. 71-640), a case originally brought in 1969 by then-Attorney General Thomas Lynch to require the racial balancing of the pupil population of the San Diego City Schools, the California Attorney General advised the United States Supreme Court on February 29, 1972, that:

> 1. In 1971 the California Legislature enacted Chapter 1765 adding sections 5002 and 5003 to the Education Code, which establish the policy of the State of California to eliminate racial imbalance where it exists in our public schools. These sections also impose on each school district a responsibility to prepare and implement plans to accomplish this goal...

2. The above mentioned legislation achieves the objectives sought by my predecessor in filing the litigation against the San Diego Unified School District. For this reason I deem it unnecessary to pursue this litigation and I intend to forthwith undertake steps to dismiss this proceeding in the San Diego Superior Court.

3. For the above reasons the undersigned respectfully states that no further response to the Petition for Certiorari shall be filed in this proceeding.[4]

The United States Supreme Court subsequently refused to grant the San Diego Unified School District's PETITION FOR WRIT OF CERTIORARI and the California Attorney General, true to his words, above, dismissed the case in the San Diego Superior Court.

The point is: The TITLE 5 sections existed during the pendency of the entire lawsuit. But, it was the enactment of Education Code Sections 5002-5003 that prompted the California Attorney General to conclude that the law now had been sufficiently clarified and responsibilities adequately specified by the Legislature for a continuing program of racially balancing the pupil population of public school districts in California to warrant suspension of further consideration of the matter by the judiciary. On the same basis, the California Attorney General also dismissed a similar lawsuit against the Bakersfield City Schools. In a real sense, these dismissals shifted the urgency and emphasis in public school pupil racial and ethnic balance cases, as far as San Diego and Bakersfield are concerned and at least for the time being, from the judiciary to the Legislature and State Board and Department of Education.

5. <u>There Are Specific Differences Between the Education Code and TITLE 5 Provisions</u>. As indicated in EXHIBIT A, there are some differences in language of the Education Code and TITLE 5 Provisions. The first difference is the deletion of the words "exert all effort to" (prevent and eliminate racial and ethnic imbalance in pupil enrollment) from Education Code Section 5002. Now, the plain legislative mandate is to "prevent and eliminate racial and ethnic imbalance in pupil enrollment." Other differences in language between the Education Code sections and TITLE 5 sections probably permit more flexibility in the administration of the policy by the State Board of Education. At the same time, as indicated above, this new flexibility in carrying out the new Legislative policy underscores the need for specific rules and regulations promulgated by the State Board of Education to implement Education Code Sections 5002-5003 at an early date, especially relating to the exact requirements and responsibilities, if any, to be imposed upon local public school districts to take affirmative action to remedy pupil racial or ethnic imbalance.

6. <u>The New Education Code Sections Appear to Be the Precursors of Future State Legislation</u>. Education Code Section 5003(d) requires that the State Department of Education submit each year a "summary report" of the Department's

> . . . findings as to the adequacy of alternative district plans and implementation schedules . . .

relevant to the actual carrying out of the Legislature's new policy on pupil racial and ethnic balance in the local public school districts of California. It is reasonable to recognize that the data thus presented to the Legislature may be used to formulate future amendments to Education Code Sections 5002-5003.

In conclusion, certain practical steps are indicated by the addition of Education Code Sections 5002-5003 to the statutes of California. These include:

1. Local public school districts should commence complying with Section 5003 in the spirit articulated by Section 5002 of the Education Code by initiating the preparation of "alternative plans" at the earliest date and to the extent possible in the absence of implementing rules and regulations to be adopted by the California State Board of Education;

2. The California State Board of Education should consider and adopt at the earliest practicable time precisely drafted rules and regulations required under Education Code Section 5003 to implement in a clear and unambiguous manner the new Legislative policy expressed in Sections 5002-5003;

3. The People should be kept fully informed of (a) the development of "alternative plans" by local public school districts and (b) the preparation of State Board of Education Rules and Regulations, to enable the People to voice their views about the various proposals while such proposals are in the developmental stages; and

4. Local State Legislators should be regularly apprised of the matter in which ongoing local implementation of Education Code Sections 5002-5003 is being carried out.

FOOTNOTES

1. Sections 14020-14021, TITLE 5, California Administrative Code, were based on Section 2010, originally adopted as a rule and regulation by the California State Board of Education in October, 1962, and Section 2011, added in February, 1963. In February, 1969, Sections 2010 and 2011 were amended extensively. In 1970, Sections 2010 and 2011 were renumbered without change as Sections 14020-14021. As a result of the decision of Superior Court Judge A. Gitelson in the Los Angeles City School District pupil racial segregation lawsuit adverse to the school district, the State Board of Education took action to repeal Sections 14020-14021 on March 12, 1970, as an "emergency" measure and, thus, not requiring the public notice of such proposed repeal as required by law in non-emergency situations. The Sacramento Superior Court, in Colley v. State Board of Education (Sacramento County Sup. Ct. No. 201941, May 27, 1970) found that no "emergency" existed in fact or at law on March 12, 1970, and decreed that Sections 14020-14021 were still in full force and effect as a rule and regulation of the State Board of Education. Subsequently, public notice was given that Sections 14020-14021 would be repealed but, to date, the State Board of Education has taken no repealer action and they abide.

2. Letter opinion of the Legislative Counsel of California dated February 17, 1972, to the Honorable William T. Bagley, Assemblyman, author of CHAPTER 1765, STATUTES 1971, which added Education Code Sections 5002-5003, effective March 4, 1972.

3. Ibid. The California Legislative Counsel based his opinion on Sections 14020-14021, TITLE 5, California Administrative Code, and the following cases: Westminister School District of Orange County V. Mendez, 161 F. 2d 774 (1947); Jackson v. Pasadena City School District, 59 Cal 2d 876 (1963); San Francisco Unified School District v. Johnson, 3 Cal 3d 937 (1971); Serrano v. Priest, 5 Cal 3d 584 (1971); People v. San Diego Unified School District, 19 Cal App 3d 252 (1971) and Brown v. Board of Education, 98 L. Ed. 873 (1954).

EXHIBIT A

A COMPARISON OF SECTIONS 14020-14021, TITLE 5 OF THE CALIFORNIA ADMINISTRATIVE CODE AND SECTIONS 5002-5003 OF THE CALIFORNIA EDUCATION CODE

* * * * *

Sections 5002-5003 of the California Education Code, adopted by the 1971 Regular Session of the California Legislature effective March 4, 1972, were based largely on the pre-existing Sections 14020-14021, TITLE 5 of the California Administrative Code, which were adopted in 1968 by the California State Board of Education as part of its rules and regulations governing California public school districts.

Accordingly, there appears below the language of Sections 14020-14021 and Sections 5002-5003. Words which have cross-out lines are words contained in TITLE 5 Sections 14020-14021 but not in Education Code Sections 5002-5003; words which have underlines below them are words contained in Education Code Sections 5002-5003 but not in TITLE 5 Sections 14020-14021. The comparison is as follows:

~~14020~~ 5002. It is the declared policy of the ~~State Board of Education~~ Legislature that persons or agencies responsible for the establishment of school attendance centers or the assignment of pupils thereto shall ~~exert all effort to~~ prevent and eliminate racial and ethnic imbalance in pupil enrollment. The prevention and elimination of such imbalance shall be given high priority in all decisions relating to school sites, school attendance areas and school attendance practices.

~~14021~~ 5003.

(a) In carrying out the policy of Sections ~~14020~~ 5002, consideration shall be given to factors such as the following:

(1) A comparison of the numbers and percentages of pupils

of each racial and ethnic group in the district with their numbers and percentages in each school and each grade.

(2) A comparison of the numbers and percentages of pupils of each racial and ethnic group in certain schools with those in other schools in adjacent areas of the district.

(3) Trends and rates of population change among racial and ethnic groups within the total district, in each school, and in each grade.

(4) The effects on the racial and ethnic composition of each school and each grade of alternate plans for selecting or enlarging school sites, or for establishing or altering school attendance areas and school attendance practices.

(b) The governing board of each school district shall periodically, at such time and in such form as the Department of Education shall prescribe, submit statistics sufficient to enable a determination to be made of the numbers and percentages of the various racial and ethnic groups in every public school under the jurisdiction of each such governing board.

(c) For purposes of ~~these regulations~~ Section 5002 and this section, a racial or ethnic imbalance is indicated in a school if the percentage of pupils of one or more racial or ethnic groups differs ~~by more than 15 percentage points from that in all the schools of the district~~ significantly from the district wide percentage.

(d) A district shall study and consider possible ~~alternative~~ plans ~~when~~ which would result in alternative pupil distributions which would remedy such an imbalance upon a finding by the Department of Education that the percentage of pupils of one or more racial or ethnic groups in a school differs significantly from the districtwide percentage. A

district undertaking such a study may consider among feasibility factors the following:

(1) Traditional factors used in site selection, boundary determination, and school organization by grade level.

(2) The factors mentioned in subparagraph (a) hereof.

(3) The high priority established in Section ~~14020~~ 5002.

(4) The effect of such alternatives on the educational program.

In considering such alternative plans the district shall analyze the total educational impact of such plans on the pupils of the district. Reports of such a district study and resulting plans of action, with schedules for implementation, shall be submitted to the Department of Education, for its acceptance or rejection, at such time and in such form as the department shall prescribe. The department shall determine the adequacy of alternative district plans and implementation schedules and shall report its findings as to the adequacy of alternative district plans and implementation schedules to the State Board of Education. A summary report of the findings of the department pursuant to this section shall be submitted to the Legislature each year.

(e) The State Board of Education shall adopt rules and regulations to carry out the intent of Section 5002 and this section.